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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JUL 23 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research associate at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and a new witness letter.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on October 29, 2010. In a 54-page introductory memorandum, counsel described the petitioner's work, focusing on the Shiga toxin produced by bacteria such as *E. coli* O157:H7:

> Petitioner is an expert in the fields of [redacted] Especially, [the petitioner's] main research areas are treatments of diseases caused by human blood disorder and bacterial toxin. . . . He is one of [the] rare scientists who can perform

> interdisciplinary researches by using cutting-edge research techniques in molecular and cell biology blood researches and genetics. . . .
>
> [The petitioner] has made seminal findings on the toxin-induced stress which affects various signaling pathways underlying programmed cell death and survival in human myelogenous leukemia cells undergoing maturation. Especially, [the petitioner] is one of the exporters [*sic*] in the field of [redacted] in human cells induced by [redacted] toxins. He has shown that [redacted] toxins induce autophagy in cells that are sensitive to toxin-mediated killing and in cells that are resistant to killing. From his research results, it is anticipated to provide better ways to stop human tissue damages without side effect in those who have intestinal infection by the bacterial toxin, such as kidney failure, bloody diarrhea and gut damages. Moreover, his researches could provide key understandings about NDM-1 gene which makes some bacteria resistant to almost all standard antibiotics and its treatment, so called super bacteria.

Counsel stated that the petitioner's research accomplishments include "[c]haracterization of potential targets for development of novel interventional therapies against [redacted] toxin-induced diseases" and "[s]uccessfully, visualizing movement of the toxin-responsive target molecules into human cells with fluorescen[t] chemical dyes, indicating that human cells have survival mechanisms against pathogen attack." Counsel stated that the petitioner is researching ways of fighting bacterial infections without the use of antibiotics, to fight antibiotic-resistant strains of pathogens.

Counsel asserted that the labor certification process could result in disruption of the petitioner's work. In this vein, the AAO notes that the record contains a copy of [redacted] February 22, 2010 job offer letter to the petitioner, offering him a [redacted] position "for the period May 24, 2010 through May 31, 2011." The letter did not mention any provisions for extending this 53-week term (but did indicate that it could end earlier without cause). As the AAO will further explain later in this decision, USCIS records show that the petitioner left [redacted] before the end of that defined period. He later returned to [redacted] around November 2011, but left a second time, around February 2012.

The petitioner submitted copies of four published articles and a proof copy of a fifth article, accepted for publication but not yet published. Counsel stated: "His contributions to the scientific area can be evidenced by the citations of her [*sic*] papers by other scientists and many recommenders' recommendations." The petitioner submitted materials to show 45 citations of five articles, 28 of them independent (the balance being self-citations by the petitioner and/or his collaborators).

Six witness letters accompanied the initial filing of the petition. Four of the witnesses are on the faculties of universities where the petitioner has trained and studied. [redacted] teaches at the [redacted], where the petitioner earned his master's degree in molecular and cell biology. Dr. [redacted] credited the petitioner with "significant contributions in his research field" and "excellent research achievement[s]." Dr. [redacted], who teaches chemistry and physics and whose past experience involves nanotechnology and semiconductors, claims no training, experience or

expertise in biology. Therefore, it is not clear what authority Dr. [redacted] has when describing the significance of the petitioner's work. The remaining witnesses have stronger claims to expertise and authority when describing and evaluating the petitioner's work.

[redacted] who supervised the petitioner's doctoral studies and subsequent postdoctoral training, stated:

> [I]t is quite likely that [the petitioner's] work will identify novel targets for the development of therapeutic approaches to treat or prevent diseases caused by [redacted] toxin-producing bacteria. . . . There currently are no effective therapeutic agents or vaccines to treat or prevent disease caused by [redacted] toxin-producing organisms. Thus, the characterization of any signaling pathway activated by [redacted] toxins leading to cell death represents an important potential target for drug development.

[redacted] stated that the petitioner's "work was of exceptionally high quality and provides valuable insights on the subject of microbial infectious diseases."

[redacted] asserted that the petitioner "has made many outstanding contributions to toxicological research in general, and to elucidating pathogenesis mechanisms associated with [redacted] toxin."

[redacted], called the petitioner "a strong interdisciplinary researcher in the field of clinical microbiology, infectious disease, and cellular biology," and stated:

> Because of his extraordinary skills and diligence, [the petitioner] has performed innovative and cutting-edge research on the mechanism by which the [redacted] toxin induces host cell death including human and animal cells. His research is directed toward development of novel approaches to prevent inflammation and cell death upon exposure to [redacted] toxin. His work has direct and important clinical relevance.

[redacted] stated that the petitioner's "cutting-edge research skills [at the University of Texas] tremendously advanced the field of the Sickle cell anemia researches," and that the petitioner "continued to make remarkable contributions" "as a doctoral student" a[redacted]

> Specifically, his research has pointed to the discovery of a novel balancing mechanism for bacterial toxin-caused cell death or inflammatory responses in which the [redacted] toxins elicit a balanced pro- and anti-inflammatory or death or survival response with the long term goal of manipulating the host response to the toxin. His work in defining the role of survival factors and regulators such as Bcl-2, Death Receptor proteins in human cellular death by the toxin is very important because these are key target proteins to manipulate the immune response in human organs and

disrupt toxic action of bacterial toxin when human cells become intoxicated by pathogenic infection.

On April 15, 2011, the director issued a request for evidence (RFE), instructing the petitioner to "establish . . . a past record of specific prior achievement with some degree of influence on [his] field as a whole." In response, the petitioner submitted further witness letters and updated information about the petitioner's publications and citations thereof. Counsel maintained that the petitioner "played key and pivotal role in his researches" (*sic*).

The updated citation information showed 66 citations of four articles, with the two most-cited articles showing 29 and 25 citations, respectively. The petitioner identified the articles that cited three of the four articles. At least 15 of the documented citations are self-citations. The article for which the petitioner did not identify the citing articles is one that, in the first submission, showed only self-citations.

Eight of the submitted letters are from researchers who have cited the petitioner's articles in their own published work. The witnesses offered varying levels of praise for the work. [redacted] of [redacted] stated: "The study is well addressed to identify the novel molecular mechanism of the shiga toxin" and "was well arranged for the scientific novelty in the ribotoxic stress responses."

[redacted] stated that the petitioner's article "reported findings that we felt were of major importance to the field. [The petitioner] was co-first author on this paper indicating at he provided significant contributions to the work."

[redacted] called the petitioner's work "an important contribution to the field, indicating involvement of a critical cellular stress signalling pathway in the lethal mechanism of Shiga toxin."

[redacted] stated: "We considered the petitioner's finding] as one of our theoretical basis [*sic*] in the study of MPM."

[redacted] called the petitioner's article "a very important contribution to what is known about the mechanism of [redacted] toxin."

[redacted] stated that the petitioner's article "has contributed much to the understanding of the mechanism of the endoplasmic reticulum stress induced by Shiga toxin 1 (Stx1) . . . , and to innovate the new concept of cell death caused by Stx1 with C/EBP homologous protein (CHOP)-death receptor 5 (DR5) signaling pathways in THP-1 cells."

[redacted] stated that "excellent research findings, such as [the petitioner's] are expected to become the basis for . . . new treatments and preventive procedures. [The petitioner's] research has been considered as the major important advance in the field of biomedical sciences."

[redacted], stated that the petitioner's "article . . . represents an outstanding piece of work and was extremely helpful for me. . . . Moreover, this article . . . represents a milestone in better understanding the molecular mechanisms that underlie Stx-mediated interaction with cells of the immune system."

[redacted] staff fellow at the Food and Drug Administration, credited the petitioner with "brilliant and innovative ideas, which no one before him has attempted." Dr. [redacted] asserted that the petitioner's "expertise . . . has been absolutely crucial in providing an understanding of" the various subjects that the petitioner has researched.

The remaining three letters are from prior witnesses. New letters from [redacted] repeated large sections of their previous letters, adding new passages to emphasize the importance of the work that the petitioner performed at the universities where he studied and trained.

[redacted] stated that the petitioner "was responsible for the hypotheses, for carrying out the experiments, and for writing the manuscripts" of several articles. [redacted] asserted: "I would not have been able to complete the specific aims of my NIH grant . . . had it not been for the [petitioner's] efforts."

The director denied the petition on June 24, 2011, acknowledging the overall importance of the petitioner's area of expertise, but stating that the petitioner had not set himself apart from his peers. The director noted that, as of the denial date, the petitioner held H-1B nonimmigrant status permitting him to work for his employer until March 31, 2014.

On appeal, the petitioner submits a new letter from Prof. [redacted] who states that the director misconstrued his earlier letters and other evidence in the record, and that the labor certification process cannot adequately accommodate the petitioner's highly specialized qualifications. In an appellate brief, counsel contends that the director did not give sufficient weight to the evidence in the record.

Counsel asserts that the director's mention of the petitioner's nonimmigrant status is irrelevant, because it gives the petitioner only temporary permission to work in the United States. The point of the director's observation was that, given that status, the petitioner could work without interruption while the Department of Labor processed an application for labor certification. This observation was relevant because witnesses had stressed that the petitioner should receive a waiver in order to avoid an interruption in his employment.

This emphasis on ensuring the continuity of the petitioner's work is relevant to the next development in the proceeding. The AAO, in consulting USCIS records, found that the petitioner left [redacted] in early 2011 in order to work for the [redacted] Thus, by the time the petitioner filed the appeal in July 2011, the petitioner had already left [redacted], even as his attorney contended that the petitioner's work was too important to interrupt.

USCIS records further showed that, although the petitioner received H-1B nonimmigrant status to work for [redacted] for three years, he left [redacted] on October 19, 2011, after about six months. He then returned to [redacted], but again left that employer on or before March 1, 2012, before his nonimmigrant status expired.

On May 30, 2012, the AAO issued a notice to the petitioner and to counsel, noting that the petitioner had apparently left three research positions (two at [redacted] and one at [redacted] for reasons unrelated to immigration issues. The AAO stated:

> The AAO can find no record of any subsequent petition from any other employer. The evidence shows that you left [redacted] twice since filing your petition, and left [redacted] with several years remaining on your H-1B nonimmigrant status. This information casts doubt on your ability and/or intention to continue performing medical research in the United States. Because your original waiver claim rested heavily on the claim that [redacted] can ill afford to lose your services, your premature and unexplained departure from [redacted] has clear consequences for the AAO's consideration of your appeal.
>
> There is no evidence that you still intend, or are able, to engage in scientific research in the United States. For this reason, the AAO intends to dismiss your appeal.

The AAO allowed the petitioner an opportunity to submit further evidence to establish that he continues to work as a researcher. The record contains no response from the petitioner or from counsel, and no evidence that the United States Postal Service was unable to deliver either copy of the AAO's notice. The petitioner's failure to respond to this notice is, itself, further grounds for denial of the petition and, thus, dismissal of the appeal. *See* 8 C.F.R. §§ 103.2(b)(13) and (14).

The AAO acknowledges that the petitioner seeks a waiver of the job offer requirement, which includes specific evidentiary demands involving factors such as labor certification and the intending employer's ability to provide compensation. Seeking a waiver of the job offer requirement, however, does not completely absolve the petitioner of any responsibility to show that he will be employed in the United States. If the petitioner is, as claimed, a highly influential researcher whose work has attracted considerable attention, then it is reasonable to expect some demand for his services. The petitioner has not shown that such demand exists, nor has he explained the premature termination of his earlier research appointments. As such, the petitioner has not rebutted the AAO's concerns about his intention and/or ability to continue his research career in the United States.

The petitioner has documented some past research contributions of note. Prospective national benefit, however, rests on future efforts rather than on past achievements. Absent evidence to show that that the petitioner will continue to work in the field, and that employers are willing to employ him, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.